

Resolution No.: 16-733
Introduced: October 7, 2008
Adopted: October 7, 2008

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: District Council

SUBJECT: APPLICATION NO. G-865 FOR AMENDMENT TO THE ZONING ORDINANCE
MAP AND APPLICATION NO. DPA 07-3 FOR AMENDMENT TO THE APPROVED
DEVELOPMENT PLAN FOR G-779, Martin Hutt, Esquire, Attorney for Applicants
Randall M. and Sheryl B. Rothstein, OPINION AND RESOLUTION ON
APPLICATION

Tax Account No. 07-00487732 (Local Map Amendment G-865)
Tax Account Nos. 07-00485334, 07-00490694, 07-00489571 and 07-00487732 (Development
Plan Amendment 07-3)

Opinion

Local Map Amendment Application No. G-865 requests reclassification from the R-60 Zone to the TS-R Zone of 8,342 square feet of land located at 7425 Arlington Road in Bethesda, in the 7th Election District, known as Part of Lot 31, Block 13, Edgemoor subdivision. It was consolidated for purposes of public hearing and the District Council's review with Development Plan Amendment Application No. DPA 07-3, which seeks to amend the existing development plan that the District Council approved in Application G-779, in February, 2001, to add to the plan the property located at 7425 Arlington Road, and to change the form of development from a four-story, mixed office/residential building with one story of office space, 12 dwelling units, and a floor area ratio ("FAR") of 1.2, to a four-story, multi-family residential building with up to 31 dwelling units and an FAR of 2.0. The existing development plan covers 28,267 square feet comprised of Lot 28, Part of Lot 29 and Part of Lot 30, Block 13, Edgemoor Subdivision. The combined gross tract area proposed in the DPA is 38,079 square feet.

The Hearing Examiner recommended approval of both applications on the basis that (i) the submitted Development Plan satisfies all of the applicable requirements set forth in the Zoning Ordinance; and (ii) the proposed rezoning and development would satisfy the purposes, standards and regulations of the TS-R Zone, would be compatible with existing and planned land uses in the surrounding area, would be in substantial compliance with the applicable sector plan and would serve the public interest. The Montgomery County Planning Board (the "Planning Board") and its Technical Staff provided similar recommendations. The District Council agrees with the conclusions drawn by the Hearing Examiner, the Planning Board and Technical Staff, as discussed below. The Hearing Examiner's Report and Recommendation dated September 15, 2008 is incorporated herein by reference.

A. Subject Property

The subject property contains a total of approximately 38,079 square feet or 0.84 acres of land located on the east side of Arlington Road, at the northeast corner of Arlington Road and Montgomery Lane, about 1,200 feet southwest of the Bethesda Metro Station and directly across Arlington Road from the Bethesda Library. The property consists of four lots: Lot 28, Part of Lot 29 and Part of Lot 30, Block 13, Edgemoor Subdivision, which were reclassified to the TS-R Zone in February, 2001 in LMA No. G-779, and Part of Lot 31, Block 13, Edgemoor Subdivision, which the Applicants seek to reclassify from the R-60 Zone to the TS-R Zone and add to the development plan that was approved in LMA No. G-779. The development plan approved in G-779 has not been implemented.

Each parcel comprising the subject property is developed with a single-family structure. The structure on Lot 28 is currently in residential use, while the other three are in non-residential use, at least some of them operating under special exception. The office of Applicant Randall Rothstein is located on one of the lots. The combined subject property has approximately 227 feet of frontage on Arlington Road and 112 feet of frontage on Montgomery Lane. It is covered mostly with buildings and pavement, although there is one specimen tree on site that would have to be removed for the proposed

development, and a cluster of trees along the property's eastern border that also would be removed. Applicants' land planner testified that the trees on the eastern property line would have to be removed for construction of a building that has been approved on the adjoining property to the east, regardless of whether the present applications are approved.

B. Surrounding Area and Zoning History

The surrounding area for these applications consists of the area bounded roughly by properties fronting Arlington Road and Edgemoor Lane to the north, excluding properties that front on Moorland Lane; Woodmont Avenue to the east; Hampden Lane to the south; and properties along the west edge of Arlington Road to the west.

The surrounding area is primarily classified under the TS-R Zone, and contains a mix of residential uses and non-residential uses in residential structures. To the north, the subject site abuts the Villages of Bethesda ("VOB"), a townhouse community in the TS-R Zone that occupies the northern half of the block on Arlington Road and wraps around the corner onto Edgemoor Lane. Northeast of the subject site, north and east of VOB on either side of Edgemoor Lane, are two high rise buildings in the TS-R Zone known as The Chase, which front on Woodmont Avenue. Tennis courts associated with The Chase abut VOB to the east. Farther north, across Edgemoor Lane, Arlington Road is lined with single-family structures up to the next corner, at Moorland Lane. These structures house non-residential uses or combined residential/office uses.

To the east, the subject site abuts a property owned by the Holladay Corporation that was recently reclassified to the TS-R Zone in LMA No. G-843 (2007), and has an approved development plan and site plan for construction of a six-story multi-family building (the "Holladay building").¹ The Holladay property is currently occupied by single-family structures, some or all of which are used for non-residential purposes. These structures front on Montgomery Lane and West Lane. Farther east on

Montgomery Lane are two single-family structures on the eastern side of West Lane, and the Edgemoor Condominium, a 100-story multi-family building that occupies the northwestern corner of Montgomery Lane and Woodmont Avenue. The Bethesda Central Business District (“CBD”) begins on the east side of Woodmont Avenue and includes the Bethesda Metro Station approximately 1,000 feet farther east.

To the south, across Montgomery Lane, the subject property confronts a four-story multi-family building known as The Edgemoor at Arlington, which sits on land that was reclassified to the TS-R Zone in 2002, in LMA Case No. G-778. LMA No. G-778 was approved contemporaneously with G-779, the original rezoning for the southern part of the subject site. The Applicant proposes a building very similar to The Edgemoor at Arlington for the subject site, although the new building would be quite a bit larger. Abutting the Edgemoor at Arlington to the east, diagonally across from the subject site, are the City Homes Townhouses, a community of large townhouses stretching almost to Woodmont Avenue. The parcels between City Homes and Woodmont Avenue were reclassified to the TS-R Zone in LMA No. G-819 (2006). These parcels are the subject of an approved development plan for a multi-family building with a height ranging from 65 to 71 feet. The development plan has not been implemented, and the land remains occupied by single-family structures used for office purposes. Abutting The Edgemoor at Arlington to the south is a long, narrow tract of land that was recently reclassified to the TS-R Zone in LMA No. G-842/DPA 06-2 (the “Hampden Lane property”). That decision approved a 60-unit multi-family building with three to four stories on Arlington Road, stepping up to seven full stories and a partial eighth story farther back along Hampden Lane.

To the west, across Arlington Road, the subject site confronts the Bethesda Library and its parking lot. To the northwest is Bethesda Elementary School. Farther west is the Edgemoor residential community in the R-60 Zone, a stable neighborhood of single-family detached homes. The nearest single-family home in the Edgemoor community is approximately 300 feet west of the subject property.

¹ The building design steps down to four stories where it fronts on Montgomery Lane, but the portions abutting the

All of the lots comprising the subject property were classified under the R-60 Zone when the zone was enacted and mapped in the 1954 Regional District Zoning. The 1958 County-wide Comprehensive Zoning confirmed the R-60 zoning of the site. A series of special exceptions have been granted for the various lots. As noted above, the three lots closest to the corner were reclassified to the TS-R Zone in 2001 via LMA No. G-779.

C. Proposed Development and Development Plan

The Applicant proposes to construct a single building on the combined subject site, a multi-family building with approximately 68,000 square feet, a maximum of 31 dwelling units, underground parking and a rooftop terrace. The building would have three stories and a maximum height of 35 feet in height along its Arlington Road façade, stepping up to four stories and a maximum height of 48 feet ten feet back from the front façade. The fourth story would be stepped back five feet farther on the north and south sides of the building, providing a cascading effect at the top floor level. The maximum FAR would be 2.0, although the current design calls for an FAR of 1.8.² The public open space requirement of the TS-R Zone would be satisfied by a plaza area in front of the building, in a 15-foot setback between the public right-of-way line and the building. The active-passive recreational space requirement would be satisfied primarily by rooftop space, as well as small open areas at ground level at the rear of the building and along its north side. The largest open area behind the building is designed to coincide with an open area on the VOB property and an open area planned for the Holladay property, to make the best use of the combined open space. The sole point of vehicular access would be on Montgomery Lane, directly across from the garage entrance for The Edgemoor at Arlington.

Pursuant to Code § 59-D-1.11, development under the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is

subject property and VOB will have six stories.

² The Applicants have set a higher FAR and a slightly higher maximum building height in the binding elements than what their current design calls for, recognizing the need for some flexibility in the event of unexpected physical limitations or regulatory changes at the time of site plan.

reclassified to the zone. This development plan must contain several elements, including a land use plan showing site access, the general build and height of proposed buildings and structures and their relationship to one another and to adjacent areas, gross floor area of buildings by type of use, FAR of buildings, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. The development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual, and the site plan approved by the Planning Board must conform to the development plan approved by the District Council. *See* Code § 59-D-1.2. The Zoning Ordinance specifies that in the TS-R Zone, building height is to be determined not at the zoning stage, but during site plan review. *See* Code § 59-C-8.51. A maximum height may be established on the development plan, but exact building heights cannot be set at this stage.

The principal component of the development plan in this case is a document entitled “Land Use Plan for Development Plan and Development Plan Amendment,” Exhibit 95(a), hereinafter referred to as the Development Plan, which contains a drawing of the proposed site layout as well as notes, tables and written binding elements. Additional items required for a development plan have been submitted in the form of a vicinity map (Ex. 15), a preliminary forest conservation plan (Ex. 12) and a natural resources inventory/forest stand delineation (“NRI/FSD”) (Ex. 13).

Exhibit 95(a) contains all of the elements required under Code § 59-D-1. As stated in the General Notes, the building footprint and entrances are approximate. The exact building location will be determined during site plan review. Architectural features and the location of balconies and number of windows are considered illustrative, although the textual binding elements commit the Applicants to provide windows on all four facades; a building façade that is articulated with varied fenestrations; and a predominantly masonry façade, constructed primarily of brick. The textual binding elements also establish a maximum of 31 dwelling units; any required MPDUs on site; a minimum building setback of

15 feet from the right-of-way for Arlington Road for the first three floors, with the fourth story set back at least another ten feet; a maximum height of 35 feet for the first three floors and 48 feet overall; and a minimum building setback of 15 feet from the north property line, with the fourth story set back at least an additional five feet. The Development Plan does not propose a minimum number of units. Depending on the number of units built and the MPDU rules in effect at the time of site plan, it is possible that no MPDUs will be required. Evidence suggests that the Applicants may seek site plan approval for as few as 19 units, just below the current MPDU threshold.

During the second hearing day, certain additions and corrections to the textual binding elements were made by hand. As specified at the close of this resolution, the handwritten changes will have to be typed onto the Development Plan before it is submitted to the Hearing Examiner for certification.

D. Master Plan

The subject property is located within the area covered by the *Bethesda CBD Sector Plan, Approved and Adopted July 1994* ("Sector Plan"). It is not within the Bethesda CBD, but is in the area designated in the Master Plan as the TS-R District. See Sector Plan Figure 3.1, at p. 38. The Sector Plan's basic vision for the TS-R District is set forth below (Sector Plan at 5):

The Plan recommends creation of a high-density, low-rise 'urban village' that steps down in height from 6 floors along Woodmont Avenue to 3 floors along Arlington Road, and provides from 45 to up to about 100 dwelling units per acre. The Plan retains and revises the TS-R (Transit Station-Residential) Zone to achieve this vision.

The urban village concept was described in detail, with written objectives, extensive written recommendations, urban design guidelines and several maps and drawings. The objectives were as follows (Sector Plan at 80):

1. Provide incentives for and remove barriers to achieving high-density housing in the TS-R District.

2. Increase flexibility in the TS-R Zone to allow the district to achieve a low-rise, high-density “urban village” pattern.
3. Retain residential scale along Arlington Road.

The Sector Plan recommended that the parcels comprising the subject property retain their existing R-60 zoning as the base zoning, with TS-R as a recommended floating zone. Like most of the Arlington Road frontage in the TS-R District, the subject site was recommended for mixed use. The text explains that commercial uses should be limited to the ground floor, or possibly above ground floor if restricted to 20 percent of the total floor area and commercial uses do not share common pedestrian access with residential. The plan also recommended that special exception uses in single-family houses be permitted to continue.

The District Council finds that the residential use proposed for the subject site substantially complies with the Sector Plan’s recommendations for this site. One of the three general objectives for the district was to achieve high-density housing, and none of the objectives includes promoting non-residential uses. Moreover, the text sharply limited the extent of non-residential uses that the plan considered appropriate. The District Council concludes that residential uses were the focus of the TS-R District and the “mixed use” recommendation was intended to accommodate special exceptions and limited other commercial uses where desired, but not to require them. This conclusion is supported by the existing pattern of development: three of the five properties along Arlington Road that are recommended for mixed use as part of the TS-R District have been constructed with or approved for residential-only developments.

The Sector Plan recommended the TS-R Zone to provide more flexibility in site development. It encouraged a “low-rise, high-density ‘urban village’ form of development,” consisting of three- to six-story apartment buildings with the appearance of townhouses, unit entrances on the street, parking underground or in the rear, and internal, private open space. See Sector Plan at 82-84. The Sector Plan proposed a minimum density of 45 dwelling units per acre throughout the TS-R District

except along Arlington Road, where no minimum density was recommended “to allow townhouse development at lower densities.” See Sector Plan at 82. The maximum density recommended was up to 2.5 FAR or 100 dwelling units per acre.

Although the Sector Plan’s recommendation for densities below 45 dwelling units per acre along Arlington Road was described as permitting townhouse development, expert testimony supports the conclusion that the Sector Plan did not limit all new development on that road to townhouses, and that the maximum of 36 dwelling units per acre proposed on the subject site would help balance nearby high-rise density. The District Council finds that the Sector Plan recommended no minimum density along Arlington Road, which is consistent not only with townhouses but with the notion of stepping down both height and density from the CBD core to the edges of the Sector Plan area. Thus, even if the Applicants seek site plan approval for only 19 units, as some evidence suggests, the resulting density of approximately 22 units per acre would not conflict with any Sector Plan provision.

The subject property is located in an area recommended on a height-district map for a maximum height of 35 feet, which corresponds to three stories for a residential building. The text of the Sector Plan calls for building heights to step down from the Bethesda Metro Center properties to achieve desirable and compatible transitions to adjacent areas. More specifically, it recommends building heights in the TS-R District “urban village” of six stories along Woodmont Avenue, stepping down to three stories along Arlington Road. Technical Staff found that the building proposed here, with a maximum height of 35 feet along Arlington Road for the first ten feet of the building façade, stepping up to a maximum of 48 feet in height, would be consistent with the Sector Plan. This finding was based primarily on the fact that the existing development plan for three of the lots comprising the subject site, approved in LMA G-779, permitted the same height limitations: 35 feet for the first ten feet off of Arlington Road, rising to 48 feet for the fourth story. Staff concluded that in G-779 (and in G-778, which rezoned the site of The Edgemoor at Arlington, across Montgomery Lane), “the height of the building was

established as a result of the architectural style and the need to adjust the height of the structure to the transitioning elevation of Arlington Road which rises to the north.” See Staff Report at 10. In the present case, Staff finds that the proposal conforms to the Sector Plan, and supports the overall design and the landscaped rooftop terrace for use by residents.

The Applicants’ land planning expert opined that the proposed building would satisfy the Sector Plan’s height recommendations by providing a graduated increase in height from the nearest single-family home 300 feet to the west to the six-story building approved on the Holladay property, adjacent to the subject site to the east, and to the high-rise apartment buildings on Woodmont Avenue. He also cited other Sector Plan recommendations that he feels the proposed building would satisfy, including recommendations to step down building heights from Metro Center; to treat rooftops as sculptural elements and usable outdoor space; to retain residential scale along Arlington Road; to avoid leaving isolated parcels; and to follow urban design guidelines. The urban design guidelines called for low-rise building heights stepping down to three floors along Arlington Road and up to six floors near Woodmont Avenue, 15-foot setbacks from the Sector Plan right-of-way for Arlington Road, residential entrances on the street to encourage street life, and parking underground or in rear decks, where it will not be seen.

Community members pointed out that the urban design guidelines also recommended designing roof tops “to achieve a residential image by using hip roofs, gables, turrets, and other types of pitched roof lines,” because a “varied roof line is desirable to improve character and reduce the sense of bulk.” The District Council notes that the general design guidelines for the Sector Plan, on page 40, display a dual desire for rooftops: to treat them as “sculptural elements” that contribute to the visual interest of the skyline, and to consider them as usable outdoor space where appropriate. Thus, it appears that a variety of roof choices could be consistent with the Sector Plan, including a flat roof with terraces for residential use.

The Montgomery County Civic Federation argued that the 35-foot maximum height recommendation should be applied to the entire building proposed on the subject site, regardless of what was approved in G-779 or other nearby zoning cases, because the Sector Plan's height district map (Sector Plan page 39) clearly extended the 35-foot height for the full depth of the parcels fronting on Arlington Road. The District Council notes, however, that the building proposed here would be consistent with the Sector Plan recommendation to step down heights from the Metro Center area towards Arlington Road, as it would be lower in height than the Holladay building and the nearby high-rises, and even slightly lower than the City Homes townhouses, which are about 50 feet tall. There is, moreover, enough ambiguity in the language of the Sector Plan to permit the interpretation proposed here, i.e. that it is sufficient to have a 35-foot height only for the first ten feet off of Arlington Road. That interpretation has been applied repeatedly by the District Council and the Planning Board along this stretch of Arlington Road, in G-778 (The Edgemoor at Arlington), G-779 (part of the subject site) and G-842 (the Hampden Lane property). In each of these cases, the District Council approved a building with a height of 35 feet along Arlington Road, stepping up within a short distance to a greater height and additional stories. The Planning Board and its Technical Staff have similarly found, repeatedly, that ten feet of 35-foot height is enough to constitute "stepping down" to 35 feet on Arlington Road.

The standard we have consistently applied in zoning cases, as specified in 59-D-1.61(a), is substantial compliance with the applicable master or sector plan. The proposed development would substantially comply with the use and density recommended in the Sector Plan, as noted above, and with applicable urban design guidelines. It would contribute to the "tenting" effect of building heights decreasing as they move away from the CBD core; it would in part step down to 35 feet along Arlington Road; it would avoid the isolation of a parcel that otherwise would remain an R-60 island between TS-R developments; it would have the recommended 15-foot setback from Arlington Road, with the building entrance on the street; it would have articulation with varied fenestrations; it would create usable outdoor

roof-top space; and the parking would be underground. Based on all of the above considerations and relying on the preponderance of the evidence, the District Council concludes that the proposed development would substantially comply with the recommendations of the Sector Plan.

E. Public Facilities

A traffic study is not required for the proposed development under the Planning Board's guidelines for Local Area Transportation Review ("LATR") because the development is expected to generate less than 30 vehicle trips during the morning and evening peak hours. Below the threshold level of 30 peak hour trips, the LATR Guidelines consider a development too small to have a measurable traffic impact on a specific local area. Accordingly, the Applicant did not submit an LATR study in this case. The Applicants' traffic expert estimated that the proposed development would generate a maximum of 14 peak hour trips. Net of the trips generated by existing uses on the site, he estimated that the proposed development would result in an increase of one trip in each of the morning and afternoon peak hours, and would have a very minor impact on nearby intersections. Technical Staff agreed with these conclusions.

The Applicants' traffic expert opined that consolidating the five existing driveways into one would have an operational benefit along Arlington Road. He acknowledged that creating a single driveway on Montgomery Lane would result in more vehicles passing through the intersection of Montgomery Lane and Arlington Road. In his view, given the overall level of trip generation, the impact would be very minor. Analyzing the proposed driveway location on Montgomery Lane, the Applicants' traffic expert noted that the road is straight and there are no visual obstructions to block a driver's line of sight. He opined that the proposed driveway location would be safe, adequate and efficient.

Testimony from the Applicant's land planner indicates that all necessary utilities, including public water and sewer, are readily available to the subject site and would be adequate for the proposed development. Technical Staff confirms that the subject property is served by public water and sewer, and that the proposed development would have no impact on these systems.

The subject property is located in the Bethesda Elementary School, Westland Middle School and Bethesda Chevy-Chase High School attendance areas. Based on average yield factors developed by MNCPPC, Montgomery County Public Schools ("MCPS") expects the proposed development to generate approximately two elementary school students, one middle school student and one high school student. According to MCPS capacity calculations, enrollment exceeds capacity at the Bethesda Elementary School and is projected to exceed capacity in the future. Enrollment at the local middle school exceeded capacity at the time of the hearing, but an addition was scheduled to open in August 2008. Enrollment at the local high school currently exceeds capacity, but an addition is scheduled to open in August 2009.

The Planning Board is required under the Growth Policy to determine, for each fiscal year, whether each school cluster has adequate capacity under the Growth Policy test to permit approval of additional subdivisions. The result of the Planning Board's school capacity evaluation for Fiscal Year 2009 indicates that eight school clusters, including the Bethesda-Chevy Chase cluster, exceed 105 percent of program capacity at the elementary level. As a result, any subdivisions approved during FY2009 in the Bethesda-Chevy Chase cluster will be required to make a school facilities payment. The record does not indicate whether the Bethesda-Chevy Chase cluster would pass the capacity test under the Growth Policy that was in effect when these applications were filed, because the Planning Board no longer applies that test. Case law permits the District Council to deny a rezoning based on school overcrowding, on the theory that if a cup is full, even one more drop can cause it to overflow. *See Malmar Associates v. Board of County Commissioners for Prince George's County*, 260 Md. 292, 307, 272 A.2d 6 (1971). However, in light of the very small number of students the proposed development is expected to generate, the District Council does not consider the potential impact significant enough to warrant denial of the applications.

F. Development Plan Findings

The District Council finds that the Development Plan submitted with these applications satisfies all the requirements for a development plan under Code §59-D-1.61(a)-(e). Each of the required findings is addressed below.

§59-D-1.61(a): substantial consistency with use and density indicated in master plan, no conflict with other county plans and policies. As discussed in Part D above, the District Council concludes, based on the preponderance of the evidence, that the proposed rezoning and development will substantially comply with the use and density recommended in the Sector Plan. No evidence of record suggests that the proposed development will conflict with any established county plan or policy. Moreover, the evidence indicates that the proposed rezoning and development will be consistent with the Growth Policy and the Capital Improvement Program.

§59-D-1.61(b): purposes of the zone; safety, convenience and amenity of residents; and compatibility with adjacent development.

1. Intent and Purpose of the Zone

Section 59-C-8.21 of the Zoning Ordinance states that the TS-R Zone is intended to be used in transit station development areas and in locations where multiple-family residential development already exists or is recommended by the master plan. The subject property is located within a transit station development area designated in the Sector Plan. It is also in an area where multi-family housing already exists. Thus, the application of the TS-R Zone to the subject property would be consistent with the intent of the zone.

The purposes of the TS-R Zone are to promote the effective use of transit station development areas; to provide residential uses within walking distance of transit stations; to provide a range of densities to match the diverse characteristics of the County's several transit station areas; and to stimulate coordinated, harmonious development, prevent detrimental effects on the use or development of

adjacent properties or the surrounding neighborhood, provide housing for persons of all economic levels, and promote health safety and welfare. The District Council finds that the proposed rezoning will be consistent with these purposes. It is located within walking distance of the Bethesda Metro Station, and the range of potential densities will add to the broad range of residential densities and housing prices already existing in the area. The elements of the purpose clause to “stimulate the coordinated, harmonious and systematic development of the area” and “prevent detrimental effects to the use or development of adjacent properties or the surrounding neighborhood” effectively make compatibility of the rezoning with the surrounding area part of the purpose clause.

The District Council concludes, based on a preponderance of the evidence, that the proposed Development Plan would be compatible with existing and planned development in the surrounding area. The use proposed – multi-family residential – is clearly compatible with the residential uses in nearby buildings and additional multi-family buildings that have been approved but not yet built. As to the compatibility of the proposed building, no arguments have been made to suggest that it would be incompatible with The Edgemoor at Arlington to the south, or with the Holladay building that has been approved to the east. The former is the same height as proposed here, and would be buffered by the width of Montgomery Lane. The latter would have little physical separation from the proposed building, since its developer chose to site the building just six feet off their joint property line, but it would enjoy the superior position of a significantly taller building. Some community members argued that the proposed building would be incompatible with the neighborhood generally, and with the Bethesda Library across the street, because it would change the current impression of openness and low-rise buildings. However, the library building would be buffered from any adverse effects by the four lanes of Arlington Road. Moreover, the preponderance of the evidence, including expert testimony and evidence showing how the building would fit in along Arlington Road, demonstrates that the proposed building would be a positive

addition to the Arlington Road streetscape, contributing to the low-rise, high-density urban village envisioned in the Sector Plan and to a sense of continuity among the buildings.

The most significant compatibility question in this case involves VOB, to the north. VOB contains four rows of townhouses grouped around a central open space. One row of townhouses backs onto the subject property, and each of the four units in that row has a small outdoor terrace that sits right on the property line. Owners of three of these units participated in the hearing and expressed great concern about the impact of the proposed building. They argued that the proposed building would be too close to their homes to preserve a reasonable sense of privacy, that its bulk and mass would be excessive, that it would plunge their terraces into shadow for even more of the day than they are already, and that the rooftop terraces would create noise problems. VOB residents argued that the fourth floor of the proposed building should be removed entirely, that the building should be set back 20 feet from the northern property line, rather than 15, and that the rooftop terraces should be farther away from the north side of the building.

In response to these arguments, the Applicants presented extensive expert testimony from their land planner and architect, both of whom opined that the proposed building would be compatible with its surroundings, including VOB. The land planner, John Sekerak, argued that a three-story building on the subject site would create a very clumsy transition to the adjacent VOB buildings, which are three stories sitting on top of a nine-foot-tall parking garage platform, as well as the four-story Edgemoor at Arlington building to the south, and particularly the six-story Holladay building that has been approved for the adjacent property to the east. The VOB townhouses closest to the subject site are 35 feet in height as measured from the top of their garage platform, not as measured from the street. As a result, and because Arlington Road slopes down from north to south, the top floor of the proposed building would be roughly even with the peak of the VOB rooftops. The proposed building would be slightly deeper than the nearest row of townhouses and slightly taller, making the confronting ends of the two buildings

comparable in size. The proposed building would, of course, have a much longer façade along Arlington Road than a row of four townhouses, but this would not have the immediate impact on VOB residents of the building's north façade. With the specified 15-foot minimum setback from the north boundary, plus the setbacks of the VOB townhouses varying from 10 to 12 feet, the building-to-building setback between the proposed building and VOB would be between 25 and 27 feet. This would be greater than the building-to-building setback between VOB and the Holladay building, and greater, as the architect pointed out, than the distance between single-family detached homes in some single-family zones.

The proposed building would reduce the sense of privacy that VOB residents currently enjoy, since they now have the luxury of looking down on a small, single-family building whose windows rise no higher than the VOB privacy fences. The District Council agrees with the Hearing Examiner, however, that the relationship between VOB and the proposed building would be consistent with reasonable expectations of privacy in an urban environment, and with the Sector Plan's "urban village" concept. The Sector Plan's vision was of low-rise, high-density housing, a concept that can be achieved with buildings that are not tall, but provide high density housing by occupying most of the lot. Thus, the concept anticipated little or no setback between buildings.

VOB residents remain convinced that noise from rooftop socializing will be intrusive, despite the fact that the main area of the rooftop terrace would be in the middle of the roof, about 85 feet from the northern property line, and the closest portion of the rooftop terrace would be approximately 40 feet from the northern property line. As architect Rui Ponte pointed out, this is considerably greater than the typical distance between backyard recreation areas for single-family homes in the R-60 Zone. He argued persuasively that townhouse dwellers in an urban setting cannot reasonably expect to have less noise intrusion from neighbors than residents of single-family homes. Both Mr. Sekerak and Mr. Ponte testified that noise disturbance is more likely run from VOB to the proposed building than the other way around, since VOB has outdoor terraces right on the property line. The District Council considers VOB

residents' concern about rooftop noise out of proportion to the likely impact, particularly since they already live with the noise from one another's terraces and from Arlington Road.

VOB residents are very concerned about the impact of shadows from the proposed building. The Applicants presented an animated shadow study that shows how shadows would move throughout the day, as well as still images showing shadow impacts at various times of day and various times of year. The District Council concludes from the shadow studies that at certain times of year and during certain times of day, the proposed building would add to the shadows falling across the closest VOB townhouses and their rear terraces. The evidence suggests that during the winter months, in particular, the proposed building would put the terraces in shade for much of the afternoon. As Mr. Sekerak explained, the VOB townhouses and their terraces experience shadows caused by other VOB units and the nearby high-rises, and will experience shadows from the Holladay building. Shadow impacts are a normal part of urban living, and even a three-story building on the subject site would add to the shadows that fall across VOB lots. If the rezoning is approved, the Planning Board, whose staff has the expertise to evaluate shadow impacts in detail, will have the authority to require further changes if it finds the shadow impacts too severe. Based on the preponderance of the evidence, the District Council concludes that the likely shadow impacts do not warrant a finding of incompatibility at this stage.

VOB residents focused on building height, proximity and shadow impacts. Another important element in a compatibility determination is density. The record indicates that the proposed building would have an FAR comparable to the top end of the range of existing densities along Arlington Road, and a dwelling unit density either somewhat below or somewhat above the range, depending on how many units are built. These proposed densities would be consistent with the character of the area, and with the Sector Plan's expectation of lower densities along Arlington Road.

Owners of the VOB units backing on to the subject site understandably would prefer to have a greater distance between the two buildings. This, however, is not an entirely reasonable

expectation in a development that chose to take advantage of the TS-R Zone's flexibility by building right up to its own property line. VOB residents might have expected that an adjoining property owner would make the same choice, building right up to its property line and leaving the townhouses with only their terraces as a buffer. The Applicants in this case did not make that choice, in all likelihood as much for the sake of their own future residents as for VOB's benefit. They chose, instead, a setback that two experts have described as reasonable, and even generous, in an urban environment. VOB residents clearly would prefer to have a three-story building next door, with a height of 35 feet from the road grade all the way back, to reduce shadow impacts and allow VOB's third stories to look down on the proposed building, rather than the other way around. If VOB had been built at a height of 35 feet from the street grade, the argument to limit the subject building to the same height all the way back would have been much stronger, for compatibility reasons if not for Sector Plan consistency. Based on the actual height of the VOB buildings above street grade, the proposed building is reasonably comparable in height. While its mass would be greater, the textual binding elements impose limitations that ensure a step-back on the fourth floor, windows on all sides, articulation and varied fenestrations, and VOB input on landscape design. These are important indicators of compatibility that will bind the present owner and any future owners.

The District Council concludes that the proposed building would achieve a greater degree of compatibility with the neighborhood as a whole, and would better promote the Sector Plan's objectives and recommendations, than the building that was approved in 2001. The original development plan would have left an isolated R-60 parcel, whereas the present proposal would promote a unified character of development. Distance and buffers are often necessary to protect a sensitive use from an incompatible building or use. Where the use and the building are compatible with their surroundings, additional protections are not needed. In this case, the textual binding elements on the Development Plan assure a form of development and type of use that will be a positive, compatible contribution to the neighborhood.

2. Standards and Regulations of the Zone

The TS-R Zone includes requirements regarding location, which echo the intent of the zone as discussed above. The zone also includes a requirement that development conform to the facilities and amenities recommended by the Sector Plan, which the proposed development would satisfy by providing dedications required for road rights-of-way and meeting the public open space and active/passive recreation space requirements of the Zone, as specified on the Development Plan.

The proposed multi-family dwellings are a permitted use in the TS-R Zone. In addition, the proposed development will be consistent with applicable development standards, as shown in the table on page 76 of the Hearing Examiner's Report and Recommendation. The proposed underground parking would comply with the TS-R Zone requirement to locate off-street parking so as to have a minimal impact on adjoining residential properties.

3. Maximum Safety, Convenience and Amenity of the Residents

The proposed development would serve the safety, convenience and amenity of site residents by providing a pedestrian-friendly, transit-oriented, urban-style housing option in a vibrant downtown area with a very high level of convenience and amenities.

4. Compatibility

For the reasons discussed in Part 1 above, the District Council concludes that the proposed development will be compatible with the land uses in the surrounding area.

§59-D-1.61(c): safe, adequate and efficient internal vehicular and pedestrian circulation systems. The Staff Report and testimony from the Applicants' traffic expert presented adequate evidence that the garage access and pedestrian circulation systems, which include an improved sidewalk along Arlington Road, would be safe, adequate and efficient.

§59-D-1.61(d): preservation of natural features. The only natural features on the subject site are one specimen tree on the site proper, which is located near the middle of the site and cannot be

saved if the site is to be developed consistent with the Sector Plan, and a group of large trees along the eastern boundary. Technical Staff concludes that the trees along the eastern boundary cannot be saved due to the development proposed on this site and the neighboring property to the east. The Applicants' land planner testified that these trees would be killed as a result of the development approved on the adjoining property, regardless of what happens on the subject site. Having already approved the development on the adjoining property, fairness argues that the District Council should not deny or remand the present applications in an effort to save the trees.

The present applications are exempt from forest conservation regulations. An approved stormwater management concept plan provides sufficient evidence that the water resource requirements of Chapter 19 would be satisfied.

Based on these factors, the District Council concludes that this paragraph is satisfied.

§59-D-1.61(e): common area maintenance. The Applicant has presented draft homeowner's association documents that are adequate and sufficient to ensure perpetual maintenance of common areas, as well as testimony by Applicant Randall Rothstein asserting that a condominium board of directors would have responsibility for such maintenance.

G. Public Interest

The District Council further concludes that the proposed zoning bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”
[*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on

public facilities. As discussed in Part D above, the District Council agrees with the Hearing Examiner, the Planning Board and Technical Staff that the subject applications are in substantial compliance with the recommendations and objectives of the *Bethesda Central Business District Sector Plan*.

The evidence supports a conclusion that utilities are adequate to accommodate the proposed development, and that the impact on public schools and roadways would be very minor. For all of the above reasons, the District Council concludes that approval of the requested zoning reclassification and development plan amendment would serve the public interest.

For these reasons and because to approve the instant zoning and development plan amendment applications would aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the applications will be approved in the manner set forth below.


Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-865, requesting reclassification from the R-60 Zone to the TS-R Zone of 8,342 square feet of land located at 7425 Arlington Road in Bethesda, in the 7th Election District, known as Part of Lot 31, Block 13, Edgemoor subdivision is hereby ***granted*** in the amount requested, subject to the specifications and requirements of the final submitted Development Plan, Exhibit 95(a); provided that the Applicants submit to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council, Exhibit 95(a), with the changes to the binding elements and notes that were handwritten at the July 2, 2008 hearing added in the same type as the existing text, within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Development Plan Amendment Application No. DPA 07-3, requesting to amend the development plan that was approved by the District Council in Application G-779 in February, 2001, to add to the plan the property located at 7425 Arlington Road and to change the form of development to a four-story, multi-family residential building with up to 31 dwelling units and a maximum FAR of 2.0, is hereby **approved** as requested, subject to the specifications and requirements of the final submitted Development Plan, Exhibit 95(a); provided that the Applicants submit to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council, Exhibit 95(a), with the changes to the binding elements and notes that were handwritten at the July 2, 2008 hearing added in the same type as the existing text, within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

This is a correct copy of Council action.


Linda M. Lauer, Clerk of the Council